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NO. 80-689

IN THE

Supreme Court of the United States

_____ TERM 1981

GARY E. WIDMAR, et al.,
Petitioners,

v.

CLARK VINCENT, et al.,
Respondents.

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE OF THE
ASSOCIATION FOR THE COORDINATION OF
UNIVERSITY RELIGIOUS AFFAIRS

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The Association For The Coordination of University Religious Affairs respectfully moves this Court, pursuant to Rule 36.3 of its Rules, for leave to file the accompanying brief amicus curiae in support of respondents in Widmar, et al. v. Vincent, et al., No. 80-689.

The consent of the parties to the filing of the attached brief has been sought by the moving party. While the

respondents gave their consent, petitioners, as a matter of policy, withheld their consent. Amicus, accordingly, proceeds under Rule 36.3.

The Association For The Coordination of University Religious Affairs (hereinafter referred to as the Association) is composed of professional university staff members assigned administrative responsibility for the coordination of religious affairs on private and state university campuses. The Association represents a multi-faith approach rather than one religion or one denomination. The Association does research into the place of religion on a univesity campus and aids its members in their jobs of counseling and coordinating student religious activities.

The Association is very much interested in this case. The decision of this Honorable Court will reach far beyond the confines of the campus at the University of

Missouri-Kansas City. The decision will affect every college and university in this country. For this reason the Association seeks to aid the Court by submitting this brief.

Therefore, amicus prays this court grant this motion and consider its accompanying brief which gives the bases and arguments for its support of respondents' position.

Respectfully submitted this ___ day of May, 1981.

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BRIEF AMICUS CURIAE

I.

INTEREST OF AMICUS CURIAE

The Association For The Coordination of University Religious Affairs (hereinafter referred to as the Association) is composed of professional university staff members assigned administrative responsibility for the coordination of religious affairs on private and state university campuses. The Association represents a multi-faith approach rather than one

religion or one denomination. The Association does research into the place of religion on a univesity campus and aids its members in their jobs of counseling and coordinating student religious activities.

The Association is very much interested in this case. The decision of this Honorable Court will reach far beyond the confines of the campus at the University of Missouri-Kansas City. The decision will affect every college and university in this country. For this reason the Association seeks to aid the Court by submitting this brief. This brief will show the need to affirm the Court of Appeals for the Eighth Circuit.

The Association recognizes that the prior briefs filed in this case have covered a wide range of areas. The Association's brief will not cover all the possible areas of this case. Instead, the brief will concentrate on the university/

student relationship and the unique place of the university in our society. This will show the importance of the freedoms at the university and that the use of facilities does not equal establishment of religion. This brief will limit its discussion to United States constitutional rights since they cannot be changed by a state constitution and clearly dictate the proper result in this case. Furthermore, the brief will show the importance of the United States constitutional rights and that no state interest should be used to deny those rights.

II.

STATEMENT OF THE CASE

The facts were submitted in this case by stipulation of the parties. The essential facts have been stated in the opinions of the district court and the court of appeals. Only a brief summary

will be made here. Respondent students and the student group, Cornerstone, traditionally had the same right to free use of the facilities as other groups at the University of Missouri-Kansas City (UMKC). In 1977 the university sharply reversed this policy and refused Cornerstone the use of the facilities. However, the university continued to allow other groups the use of the facilities. Some of the other groups were named in a memorandum quoted in footnote number 1 of the court of appeals opinion: "SPECIAL INTEREST GROUPS-- . . . Jewish College Students, . . . Young Socialist Alliance . . . Karate Club . . . , etc."

The district court relied upon Tilton v. Richardson, 402 U.S. 672 (19__) and held that the university policy was required by the establishment clause. The district court rejected the student claims of free exercise violations, prior

restraint, equal protection violation, and that the regulations were vague and overbroad.

The court of appeals reversed the district court in a carefully reasoned opinion. The court of appeals held that access to a forum cannot be denied because of the content of the message. The court of appeals held the university's policy denied the students their First Amendment right of freedom of religion. The court of appeals next rejected the district court's holding that allowing neutral use of facilities would be establishment of religion. The court properly analyzed the Tilton case as dealing solely with direct government aid to a sectarian college, and not involving violations of First Amendment rights of students. Furthermore, occasional use of facilities is completely different from the total dedication involved in Tilton. Finally, the court of

appeals thoughtfully distinguished the university setting from cases involving high school students.

III.

ARGUMENT

A. This Case Involves Adults in a University Setting

At the outset, this case must be properly characterized. The student groups in question and the students bringing the suit are adults who are suing to allow the voluntary exercise of their religion. No coercion is involved nor has there been any condoning of the activity by the university. Instead, the students are suing to allow use of the facilities in the same way other student groups may use them.[1]

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[1] The facilities are not special facilities for religion or any other purpose, nor does the use of them interfere with the functioning of the school.

The characterization of the case is important because of the variety of cases dealing with the religious clauses in the federal constitution. There have been two reoccurring categories of cases:[2] One category is cases involving religious activities in elementary and secondary schools. Another line of cases construes the propriety of states financially aiding sectarian schools. Both lines of cases are inapposite to this lawsuit, except insofar as statements by the court are clearly of a general nature. The Court of Appeals of the District of Columbia Circuit said in O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979):

> Appellants' reliance on cases treating elementary and secondary schools is inappropriate. Because of their central and delicate role in American life, and because of the unique susceptibility of their

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[2] See Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) at 722, where the court describes these lines of cases.

> captive audience, children, to coercion, the public schools have a special insulation from religious ceremony. Different considerations apply to colleges and universities, where the likelihood of coercion is less, and to other forums where free exercise values demand accommodation of religious belief.

613 F.2d at 936 (footnote omitted). The Court also recognized this differentiation in Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976).

Justice Douglas recognized that adults are involved in cases dealing with the college or university community. In Healy v. James, 408 U.S. 169 (1972), in Justice Douglas' concurring opinion, he said:

> Students--who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age--are adults who are members of the college or university community
> . . . .
> . . . .
> . . . Students as well as faculty are entitled to credentials in their search for truth. If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change,

> students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.

408 U.S. at 197.

Although Justice Douglas' remarks were made in the setting of a group objecting to political opposition, the statements are just as applicable to a situation where students are searching for religious truth. In fact, an argument can be made that there is a greater right to this since free exercise of religion is specifically protected by the Constitution while political speech simply falls under free speech and association rights. In any event, this case involves adults exercising constitutionally-protected rights in a setting which has traditionally been a forum of communication dedicated to the search for knowledge.

B. The Peculiar Nature of a University Should Be Considered

In Healy v. James, supra, the Court said:

> The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

408 U.S. at 180-181. The description of schools as a "marketplace of ideas" has also been applied to the high school context. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). Yet, it is apparent that in a university setting there is wider latitude for communication of ideas. This is true for a number of reasons: Universities are dealing with adults who are there voluntarily rather than students who are required to be there by state law. Persons attending a university are also in a position to evaluate the ideas taught them as opposed to being

indoctrinated. The court of appeals recognized this and properly distinguished other situations.

Universities also traditionally perform more functions on campuses than simple teaching of courses. Indeed, one of the primary functions of a university is to challenge the students in all aspects of their lives to prepare them for their role in society.[3] To extricate all religious elements from those challenges is to ignore the role of universities in our society.

A university is also peculiar in another way: Many universities across the United States exist as communities in and

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[3] In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court accepted the proposition that " . . . education prepares individuals to be self-reliant and self-sufficient participants in society." 406 U.S. at 221. Although this was in the context of secondary education, it also applies to universities.

of themselves. As the amicus brief for the Center For Law And Religious Freedom Of The Christian Legal Society points out, a university is the equivalent of a company town for its students.[4] Students at universities are often far from home and do not commingle in the town where the university is located. Furthermore, university students, almost by definition, are very busy individuals. Many hold jobs and go to school at the same time. Thus, to acquire university students to go off campus to exercise their constitutional rights is far more of an infringement than might otherwise appear.

The ability of students to meet off campus does not diminish the infringement of first amendment rights. This Honorable Court has stated in Healy v. James, supra:

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[4] Amicus curiae brief of the Center For Law And Religious Freedom Of Christian Legal Society, at pp. 6 and 7.

> We are not free to disregard the practical realities. MR. JUSTICE STEWART has made the salient point: "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

408 U.S. at 183. Thus, the court held that the fact students could meet off campus did not remove the constitutional violation.

Universities are a place of communication of ideas. The Court in Tinker v. Des Moines School Dist., supra, quoted Justice Brennan's statement from Keyishian v. Board of Regents, 385 U.S. 589, at 603, where he stated:

> "The vigilent protection of constitutional freedoms is nowhere more vital than in the community of American Schools." Shelton v. Tucker, [346 U.S. 479] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

393 U.S. 503, at 512.

In a university setting, this applies even more strongly than in the context of a high school demonstration against the Vietnam war. Justice Brennan later made similar statements concerning religious liberty in McDaniel v. Paty, 435 U.S. 618 (1978). In his concurring opinion, Justice Brennan said:

> Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to "flourish according to the zeal of its adherents and the appeal of its dogma." Accordingly, religious ideas, no less than any other, may be the subject of debate which is "uninhibited, robust, and wide-open . . . ." Government may not interfere with efforts to proselyte or worship in public places. It may not tax the dissemination of religious ideas. It may not seek to shield its citizens from those who would solicit them with their religious beliefs.
>
> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. The mere fact that a

> purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.

435 U.S. at 640 (citations and footnotes omitted, emphasis added).

C. First Amendment Rights Violated in This Case

The rights of free exercise of religion, freedom of association, and freedom of speech are clearly violated by the university policy. The UMKC has required students to move off campus, which is the equivalent of outlawing the student group. This removes any viability for existence of a student group because of denying them contact with other students.

In Healy v. James, supra, the Court held that the refusal of a university to recognize a local student group of the SDS would violate their right to freedom of

association. The First Circuit Court of Appeals relied on the Healy v. James, supra, case in Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974). The court said:

> It is true that there [in Healy] the university had refused to recognize the campus organization altogether rather than denying it the use of campus facilities for certain activities. But the Court's analysis in Healy focused not on the technical point of recognition or nonrecognition, but on the practicalities of human interaction. While the Court concluded that the SDS members' right to further their personal beliefs had been impermissibly burdened by nonrecognition, this conclusion stemmed from a finding that the "primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes."

509 F.2d at 658 and 659. The court specifically held that the denial of use of campus facilities equaled abridgement of the right to associate.

The respondent students are entitled to even greater protection than the SDS in Healy v. James, supra, and the gay students in Gay Students Organization of University of New Hampshire v. Bonner. Not only do the students have associational rights, but also the specifically protected right to free exercise of religion. The two are very much entwined.[5] The beliefs of the students are sincerely held. These beliefs dictate associating.[6]

To characterize the present policy of a university as an adequate accommodation

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[5] In Keegan v. University of Delaware, supra, the Delaware court said "Religion, at least in part, is historically a communal exercise." 349 A.2d at 17. Tribe, supra, says at § 14-1, p. 812: " . . . much of religious life is inherently associational . . ." This is also clear from the tenets of the particular religion involved.

[6] See the amicus curiae brief of the Center For Law And Religious Freedom Of The Christian Legal Society, pp. 4-5.

within the constitutional definition is wrong. The policy does not accommodate, but instead denies religion the opportunity to be a viable force. The policy forces religion off campus or underground rather than neutrally accommodating it. The cases indicate that free exercise cannot be denied by hiding behind the establishment clause.[7] For example, Justice Brennan concurring in McDaniel v. Paty, supra, said:

> On the other hand, the Court's decisions have indicated that the limits of permissible governmental action with respect to religion

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[7] See Abington School Dist. V. Schempp, supra, and Everson v. Board of Education, supra. Tribe, supra, also makes this point in discussing Sherbert v. Verner, supra. Tribe, supra, says at § 14-10, p. 852: " . . . There would, of course, be no cases of impermissible failure to accommodate religion if government's refusal to do so could automatically be justified simply by invoking the desirability, given the establishment clause, of complete governmental inattention to religious circumstances."

> under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause.

435 U.S. at 638.

D. Free Use of the Facilities Would Not Constitute Establishment of Religion

Given the serious nature of the violation of the students First Amendment rights, why would the university adopt this new policy? The sole rationale used was the establishment clause.[8] This is not a valid rationale for a number of reasons.

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[8] Petitioners also argue that Missouri has a "compelling state interest" for the violation of student rights. However, this ignores the seriousness of the infraction of federal constitutional rights. The premise behind the Bill of Rights is that a state cannot abridge those rights simply by having a different state policy. Furthermore, reduced to its essence, petitioners state interest argument is simply the establishment argument in another guise.

A neutral university policy would not establish religion. Other student groups are allowed use of the facilities, yet nobody would say the university officially supports the Young Socialist Alliance. Nor does the university support the Jewish College Students. By its very nature, a university accommodates a variety of perspectives. This is so widely recognized by the public that to argue establishment from mere use of facilities defies truth.

The use of facilities would not interfere with the smooth functioning of the university, nor disrupt the order needed in a university setting. The students are not seeking special facilities at high use times. Nor are the students requesting their own facilities. Instead, the students simply ask to be treated as other student groups. The university cannot assert interference with its functioning when it allows other groups to use facilities.

Petitioner tries to bolster their argument of establishment by urging that the students desire the "university imprimatur" of their activities.[9] This mischaracterizes what is involved here. The students do not seek university support; they simply ask that the university not deny them their rights by forcing them off the campus. The students recognize, for the very reasons discussed above, that allowing use of facilities would not mean that the university support their purpose. Therefore, since there is no logical reason why they would be forced off campus, it appears to other students that something else is wrong with them.

In Keegan v. University of Delaware, 349 A.2d 14 (Del. 1975), the court held that allowing students to meet in a commons

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[9] Petitioner's brief at p. 17.

area for mass would not violate the establishment clause of the Constitution. The court stated:

> University policy without the worship ban could be neutral towards religion and could have the primary effect of advancing education by allowing students to meet together in the commons room of their dormitory to exchange ideas and share mutual interests.

349 A.2d at 16. The Delaware court thus recognized that a university campus is an area where education encompasses religion in its search for truth.

The Delaware court also relied on the many indications by the Supreme Court that the proper role for the state is that of neutrality rather than either inhibiting or advancing religion.[10]

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[10] The list of Supreme Court cases advocating state neutrality is long. See for example, Abington School Dist. v. Schempp, 374 U.S. 203 (1963): "The wholesome 'neutrality' of which this Court's cases speak . . . ." 374 U.S. at 222. Everson v. Board of Education, 330 U.S. 1 (1947): "State power is no more to be used so as to

Amicus herein concurs in the discussion of the neutral role of the state in the briefs filed by respondents and other amicae.[11]

(footnote 10 continued)

handicap religions than it is to favor them." 330 U.S. 18. Zorach v. Clauson, 343 U.S. 306 (1952): "But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." 343 U.S. at 14. Committee for Public Education v. Nyquist, supra: "A proper respect for both the free exercise and establishment clauses compels the state to pursue a course of neutrality towards religion." 413 U.S. at 792. Roemer v. Maryland Public Works Board, supra: "Neutrality is what is required."

[11]While the Supreme Court has required neutrality for purposes of the establishment clause, the "wholesome neutrality" may dictate more for the free exercise clause. Thus, the state must have a strong reason to infringe upon this. Wisconsin v. Yoder, supra: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. The state may even be required to take affirmative action to ensure a person's right to free exercise of religion. Sherbert v. Verner, 374 U.S. 398 (1963). See, also, Tribe, supra, at § 14-4.

Petitioners recognize the weakness of arguing establishment from mere use of facilities and, therefore, try to bring in tax considerations. This is error. Most of the tax cases are related to financial support and do not involve corresponding abridgement of First Amendment rights. Tilton was such a case. Furthermore, this ignores the type of use requested. The students are not asking for new buildings or specially dedicated buildings. The university allows a wide range of groups to use its facilities. Most universities do not have maximum use of their facilities especially in the evenings. The tax base is not affected by allowing idle buildings to be used for student activities. Could a state refuse a certain class of persons fundamental rights simply because state taxes were involved in some way? The taxation power permeates so many activities

that this would allow rampant denial of constitutionally protected rights.

E. The Present Policy of the University Will Cause Establishment of Religion and Entanglement Between State and Religion

There is a violation of the establishment clause from the university's present policy. In Abington School Dist. v. Schempp, supra, the Supreme Court held the establishment clause is violated when there is either an advancement or inhibition of religion.[12] In this situation, the banning of the university's religious groups from campus is clearly an inhibition of religion. The state is required to be neutral and not inhibit religion as this policy does.

The present university policy has the potential for excessive entanglement

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[12] 374 U.S. at 222.

between the state and religion. The doctrine of excessive entanglement was first articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I). Since then, the doctrine has been used primarily in the area of financial aid to sectarian schools.[13] However, the dangers from excessive entanglement are just as applicable to this case. The excessive governmental entanglement with religion is what "truly threatens private liberty and public order."[14] As Justice Stevens stated in Roemer v. Maryland Public Works Board, supra, dissenting, "The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith." 426 U.S. at 775. In Walz v. Tax

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[13] See Tribe, supra, at § 14-12.

[14] Tribe, supra, at p. 689.

Commission, 397 U.S. 664 (1970), the Court was concerned with avoiding both governmental evaluations of religious practices and the entanglement of "government in difficult classifications of what is or is not religious."[15] Another danger articulated in Lemon I, supra, is the danger of government directing the religion.[16] All of these dangers exist in the present case.

The university, under the present policy, is entangled with religion. The most obvious example is the defining of what is or is not religious for the purpose of limiting the use of facilities. This Honorable Court has emphasized the need for government to stay free of matters of

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[15] Tribe, supra, at 869, quoting from Walz v. Tax Commission, supra.

[16] Lemon I, supra, 403 U.S. at 620.

religious doctrines.[17] Yet, this policy requires deciding what is religious. Amicus herein suggests that the definition of what is religious could lead to the very dangers articulated by this Court. For example, is transcendental meditation religious or not? The UMKC currently allows the Jewish college students to meet according to the memorandum cited in footnote 1 of the court of appeals opinion. Are they not religious? What about socialist/communist groups who advocate "faith" in their system? A series of this type of question will have to be answered by a university administration, if the present policy stands. The university should not define and classify what is or is not religious.[18]

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[17] See Presbyterian Church v. Hull Presbyterian Church, 393 U.S. 440 (1969) at 449.

[18] Walz v. Tax Commission, 397 U.S. 664 (1970).

Petitioners suggest that the university is capable or required to classify and that no error would result from this. Yet, petitioners themselves seriously misunderstand the nature of the beliefs of the students in this case. Petitioners say that the students are not required to evangelize and spread their message in the same way that members of the Hare Krishna sect must.[19] This position ignores a basic tenet of the religion of the students, the great commission stated in the Holy Bible: Matthew 28:19-20 and Mark 16:15. If petitioners do not understand the religion of the students in such a fundamental manner, how can others be expected to make careful and difficult decisions concerning what is or is not religious?

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[19] Petitioners' brief at p. 33, footnote 11.

The neutral policy of allowing all student groups use of facilities without discrimination or classification is best. Establishment problems would be avoided by neutrality. Entanglement problems would be avoided for the same reason because no classification or definition would be involved.

F. The Effect of This Honorable Court's Opinion

A large number of universities and colleges across the United States make an affirmative effort to be neutral toward religion by accommodating it without establishing it. Institutions across the nation recognize that religion has played an integral part in our heritage, in our culture, and in our academic life. Religion is involved in a myriad of disciplines. Such disciplines as philosophy, history, psychology, art and literature all reflect the religious background of this

nation and, indeed, humanity. Furthermore, all students have been exposed to religion and either are involved in some form of religion or have considered it prior to attending a university.

Universities and colleges recognize this and attempt to meet the needs of the students as they come to the universities by providing assistance for religious groups without advocating them. Although a university cannot meet religious needs directly, it should be free to allow religious groups to do this. Thus, many universities will give student religious groups the same rights and privileges and hold them accountable in the same way as other student groups organized for other purposes. The university will ensure that no coercion is involved between other students and members of the student religious groups, but the university will not discriminate against the groups.

These practices of colleges and universities across the nation should not have to be amended. Public universities should not have to push all religious groups off campus. A student should not be forced to shed his beliefs for four years while attending a public university, or be required to go to a private college. In view of the prohibitive cost for many people attending private institutions, there would really be no choice at all. Since most students attend public universities, the impact would be on the majority of students. This would effectively preclude many students from participating and exercising their constitutional rights to freedom of religion.

Not only would this deny the student their rights to freedom of exercising their religion, but also preclude the university from relating to this aspect of the student. Universities would also be forced to

carefully evaluate their own functions such as prayers before banquets, baccalaureate exercises and other things to ensure compliance with the decision. This would lead to much more entanglement than could ever be found in a neutral policy of free use of the facilities.

If states and universities are allowed to dictate when and how First Amendment rights may be exercised, the results are frightening. Indeed, petitioners state in their brief:

> If this Court does find an impermissible establishment in permitting such usage of university facilities, Petitioner would expect no attempt at surreptitious worship by Respondents.

Petitioners brief at p. 21. No attempt at surreptitious worship! Does this mean no prayers before eating in university diners? How far may the university go in deciding what they do not like and selectively forbidding it? Amicus respectfully submits

the purpose of the United States Constitution is to protect the rights of the people "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[20]

IV.

CONCLUSION

The unique place of a university in our society mandates a policy providing for free exercise of religion. A university is a forum of communication and open pursuit of knowledge. Students at a university are entitled to exercise religion on the campus without doing so undercover or being forced off the campus.

The well-reasoned opinion of the court of appeals should be affirmed. The law

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[20] 408 U.S. at 183.

prescribes neutral accommodation of religion and that adult students be free to exercise their First Amendment rights. The university should be compelled to permit use of the facilities by student religious groups on the same basis as other student groups.

Respectfully submitted this ___ day of ___, 1981.

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